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No. 369

In the

Supreme Court of the United States

OCTOBER TERM, 1964

MUSA HAMADEH,

Petitioner,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

WILLIAM GREENHOUSE and
OTTO OPLATKA
110 South Dearborn Street,
Room 1005,
Chicago, Illinois 60603,
Telephone: 263-6268,
Attorneys for Petitioner.

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INDEX

	PAGE
Opinions of Court below	1
Jurisdiction	2
Questions Presented	2
Statutes Invoked	2, 3, 4
Statement of the Case	4, 5
Reasons for Granting Certiorari	5-11
Conclusions	11

List of Authorities.

Barber v. Gonzales, 347 U.S. 637,; 74 S.Ct. 822	10
Barese v. Ryan, 203 I. Supp. 880	10
Bridges v. Wixon, 326 U.S. 135, 154; 65 S.Ct. 1443, 1452	2, 4
Escobedo v. Ill., 378 U.S. 478	3, 5
Gubbels v. Hoy, 261 F(2d) 952	10
Maltz v. Nagle, 27 F(2) 835	9
Massiah v. U.S., 377 U.S. 201	5
Painter v. Texas (citation unavailable)	9
Quinones v. Kennedy, 374 U.S. 469	10
Sawkaw v. INS, 314 F(2) 34	10
U.S. v. Droga, 320 F(2d) 902	6
Wood v. Hoy, 266 F(2d) 825	10
Yiannapoulos v. Robinson, 247 F(2d) 655, 7th Cir., 1957	10

PAGE

STATUTES.

Immigration and Nationality Act of 1952, as amended
Section 212(a)(19) 2
Section 241(a)(2) 2, 3
Section 241(c) 3
Section 242(b)(4) 4
Section 244(e) 4

REGULATION.

8 CFR 242.53—Title 8—Aliens and Naturalization 2

BIA DECISIONS.

In re M, 7 Adm. Dec., 601 ..... 6, 8
In re F, Int. Dec. 1220, File A15 717 621 (June, 1962) 9 Adm. Dec., 684 8
In re S, 7 Adm. Dec., 715 6
In re U, 7 Adm. Dec., 460 and 463 6

TEXT BOOK.

Gordon & Rosenfield, "Immigration Law and Procedures," page 429 8
Illinois Code of Criminal Procedure 1963, Sect. 103-2 .. 5

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The petitioner, Musa Hamadeh, prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Seventh Circuit, affirming the decision and order of the special inquiry officer and denying petition for review of the order deportation entered by the Immigration and Naturalization Service.

OPINIONS OF COURTS BELOW.

The decision of the Immigration and Naturalization Service ordering deportation is appended in the record (CCA Record, pp. 2-11).

The opinion of the Court of Appeals has been officially reported in 343 F 2 530, and is also appended in the Circuit Court of Appeals record.

JURISDICTION.

The judgment of the Circuit Court of Appeals sought to be reviewed, was dated and entered 3-24-65. See record of CCA.

Motion for a rehearing was filed 4-8-65 and was denied on 4-23-65.

Mandate of the Circuit Court of Appeals was stayed for 90 days (from 4-23-65) pending filing petition for a writ of certiorari.

Jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED.

1. Did the alien receive safeguards as outlined in *Escobedo* v. *Ill.* (378 U.S. 478).

2. Did a valid marriage exist under applicable laws.

3. Which party to the action had the burden of proof.

4. Did the special inquiry officer conduct a fair and impartial hearing and was his decision based upon reasonable substantial and probative evidence.

5. Should voluntary departure have been granted.

STATUTES INVOLVED.

Section 241 of the Immigration and Nationality Act, 8 U.S.C. §1251 provides in part as follows:

> (a) Any alien in the United States (including crewman) shall, upon the order of the Attorney General, be deported who . . . .
>
> • • •
>
> (2) entered the United States without inspection or at any time or place other than as designated by

the Attorney General or is in the United States in violation of this chapter or in violation of any other law of the United States; • • •

Section 212 of the Immigration and Nationality Act, 8 U.S.C. §1182 provides in part as follows:

(a) Except as otherwise provided in this chapter, the following classes of aliens shall be ineligible to receive visas and shall be excluded from admission into the United States:

• • •

(19) Any alien who seeks to procure, or has sought to procure, or has procured a visa or other documentation, or seeks to enter the United States, by fraud, or by willfully misrepresenting a material fact; • • •

Section 241 of the Immigration and Nationality Act, 8 U.S.C. §1251 provides in part as follows:

(c) An alien shall be deported as having procured a visa or other documentation by fraud within the meaning of paragraph (19) of section 1182(a) of this title, and to be in the United States in violation of this chapter within the meaning of subsection (a) (2) of this section, if (1) hereafter he or she obtains any entry into the United States with an immigrant visa or other documentation procured on the basis of a marriage entered into less than two years prior to such entry of the alien and which, within two years subsequent to any entry of the alien into the United States, shall be judicially annulled or terminated, unless such alien shall establish to the satisfaction of the Attorney General that such marriage was not contracted for the purpose of evading any provisions of the immigration laws; • • •

Section 242 of the Immigration and Nationality Act, 8 U.S.C. 1252, provides in part as follows:

(b)(4) no decision of deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence:

"Section 244 (e). The Attorney General may in his *discretion*, permit any alien under deportation proceedings * * * to deport voluntarily from the United States at his own expense in lieu of deportation. . . ." (if such alien shall establish to the satisfaction of the Atty. Gen. that he is and has been, a person of good moral character for at least 5 years immediately preceding his application for voluntary departure under this section.

STATEMENT OF THE CASE.

A petition for review of a final order of deportation was filed in the Court of Appeals for the 7th Circuit on 7-21-64. The cause was heard on oral argument on 3-4-65. The decision, denying the petition for review was, dated 3-24-65. A petition for rehearing was filed 4-6-65 and denied on 4-23-65. The mandate of the CCA was stayed for 90 days from 4-23-65.

The petitioner is a 31-year old male, born in Jordan, who entered the United States as a student in 1955. While still a student at Roosevelt University and in valid immigration status (page 12, line 13) he married a United States citizen on June 20, 1957. His wife then filed a visa petition (Form I-130) on his behalf, which was approved on August 9, 1957. On November 8, 1957, petitioner re-entered the United States with a non-quota visa for permanent residence, issued to him by the United States Consul at Windsor, Ontario, Canada (Exhibit 3).

On June 20, 1958, petitioner's wife secured a divorce from him on the ground of cruelty alleging in her complaint that they were married, cohabited and lived together from June 20, 1957 to July 31, 1957 (Exhibits 5 and 6).

On July 21, 1962 plaintiff remarried. His second marriage was in Jordan to a Jordanian citizen.

On November 7, 1962, petitioner filed an application for citizenship, which is still pending.

An order to show cause was issued on November 29, 1962, requiring petitioner to show cause why he should not be deported (Exhibit 1). Hearings were held which resulted in a final order of deportation and denial of voluntary departure, on 1-28-64.

REASONS FOR GRANTING CERTIORARI.

The statement of alien [Ex. 4] taken by a government investigator on 8-16-61 in paragraph 1 sets forth "I am an officer of the U.S. Immigration and Naturalization Service and desire to question you under oath regarding your right to be and remain in The U.S. Any statement you make must be made voluntarily and of your own free will. Such statement may be used against you by the Government as evidence in any criminal or civil proceeding.

It is apparent that the Special Inquiry Officer gave great weight to the statement of Petitioner (Exhibit 4), as shown by his opinion (R. p. 25, 26, 27 & 28). If this statement were excluded a new aspect would be given to the case and a re-evaluation would be proper. Petitioner was not advised that he had the right to remain silent nor was he advised of his right to consult a lawyer.

Section 103-2 (Ill. Rev. Stat. 1963, ch. 38, § 103-2) states that "*on being taken into custody* every person shall have the right to remain silent."

Under the guidance of the cases: *Escobedo* v. *Ill.*, 378 U.S. 478 (1964) and *Massiah* v. *U.S.*, 377 U.S. 201 (1964),

the failure, on the part of the government to warn the Petitioner of his right to remain silent or obtain a lawyer should result in invalidating the pre-hearing statement of Petitioner. These cited cases should apply to the instant case.

The statement itself was improperly received for the further reason that it was not a verbatim report. Rec. P. 88 & 89

It is to be noted that the present form of statements used by the I. & N. Service now contain an additional new recital "You are advised you have a right to remain silent . . ." and "you also have a right to consult a lawyer of your own choice." This safeguard was absent in Exhibit 4 and in the instant case.

The Marriage was valid under traditional requirements of mutual consent in law of contract. See *U.S.* v. *Drogo*, 320 F(2d) 902.

The alien was willing to fulfill his marital agreement (page 10, line 8; page 12, line 13), and indeed a government witness, Stella Hall, testified that alien liked Geraldine quite a bit (page 57, line 15). If the wife refused to fulfill her marital agreement, the alien should not be penalized for that. See *In re M*, 7 Adm. Dec., 601. See also *In re U*, 7 Adm. Dec., 460 and 463, where in the fourth paragraph it says:

> "We believe it satisfactorily establishes that the respondent entered into the marriage in good faith; that he intended to fulfill his marital obligations; that his failure to carry out his intention was to a considerable part the result of forces over which he had no control."

See also *In the Matter of S*, 7 Adm. Dec., 715.

The wife obtained a divorce rather than an annulment, by alleging a marriage and cruel and inconsiderate treatment thereafter; this pre-supposes a valid marriage. See Int. Dec. 1220, *In the Matter of F*, File A15 717 621 (9 Adm. Dec. 684) (June 21, 1962) where the Board of Immigration Appeals said:

> "It appears that which was present here was originally a bona fide marriage followed by a change of mind on the part of a citizen wife. Where the failure of the marriage is not the fault of the beneficiary, he is not precluded. . . ."

Ex. 7 shows the wife as a beneficiary in an insurance policy, obtained by alien.

The alien in the instant case did not enter marriage for the purpose of evading the Immigration and Nationality Act since he was in valid student status at the time he was married (page 12, line 12) and the Government uniformly permits students to remain in the United States. In the instant case a citizen sister could have filed a petition (Form I-130) in alien's behalf, which upon approval, would have accorded a fourth preference status to him under the quota. Had his sister done this he would have been eligible for immediate entry since the Jordanian fourth preference was current and open until April, 1960. Therefore, alien was otherwise admissible and did not need to avail himself of a *proforma* marriage for the purpose of evading the Immigration Laws to remain in the United States.

The order to Show Cause Ex. I par. 7: alleges that alien "failed or refused to fulfill marital agreement." This allegation shifts the burden of proof back to the government. Therefore since the government had the burden of proof—the case was tried and decided erroneously.

See *Gordon & Rosenfield,* "Immigration Law and Procedure", 4.7d, page 429. See also *In re M,* 7 Adm. Dec. of I&N Act, 601.

There were no positive findings that the alien had not established to the satisfaction of the Attorney General that a bona fide marriage was constructed for the purpose of evading any provision of the Immigration Laws or Section 241(c)(2).

Sect. 242b4 of I&N Act 8 USC 1252 specifies no decision of deportability shall be valid unless based on reasonable, substantial and probative evidence.

The testimony of admitted perjurers is not reasonable, or substantial, or probative.

The government witness testified blandly of details of conversations which purportedly took place about 6-7 years ago.

During the hearings two of the Government's chief witnesses admitted testifyng falsely and their testimony should have been disregarded *in toto.* (page 39, line 19; page 40, line 5; page 41, lines 9-12; page 60, line 21; Exhibits 5 and 6).

In addition, one of the witnesses, a Stella Hall, had the effrontery to attempt to change some of her testimony which had been given at previous hearings before the special inquiry officer, for the reason she "believed that the proceedings were against her" (page 66, line 25). The doctrine of *falsus in uno falsus in omnes* should be invoked here.

After the witnesses testified the Government introduced their statements, over strenuous objections, which contained hearsay statements and were highly prejudicial.

This was erroneous and improper and inserted into the record hearsay and prejudicial statements (page 86, line 15; Exhibit 9). Also (Exhibits 10 and 11).

In one instance there were statements introduced *after* the witness was excused. This statement set forth discrepancies such as "he told us his sister had gotten married and was able to stay here" (page 3, Exhibit 11) and (page 4, Exhibit 11) he "never mentioned that his sister entered into a marriage of convenience so she could remain in the United States."

On Page 4 Ex. 11, in the statement she stated: "He married her because by marrying a citizen of the United States he could adjust his standing so that he could remain in the United States." This was gross error and highly prejudicial.

Testimony of the witness concerning conversations she had with other people outside the presence of the alien were erroneously admitted, although objected to (page 26, line 18 to page 27, line 21).

Alien could not cross examine witness *after* she left the stand regarding her statement. Therefore right of confrontation was denied see *Painter* v. *Texas.*

Upon the receipt of hearsay evidence, alien should have been given the right to cross-examine *Maltz* v. *Nagle,* 27 F(2) 835.

Testimony of wife against her husband was inadmissible on the ground of privilege.

At pg. 42 to 44 the special inquiry officer questioned a witness, taking over the examination, and commenced asking improper questions. Objections to this procedure were ignored. This conduct was improper and prejudicial to the alien's rights.

The Government trial attorney suggested answers to the witness (page 48, lines, 23-24-25).

In *Bridges* v. *Wixon,* (1945) 326 U.S. 135, 154, 65 S.Ct. 1443, 1452, it states:

> "We are dealing here with procedural requirements prescribed for the protection of the alien. Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty —at times a most serious one—cannot be doubted. Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standard of fairness."

Quinones v. *Kennedy,* 374 U.S. 469 "Deportation is a drastic sanction."

Errors during hearings in receipt of evidence; receipt of unimportant, irrelevant and hearsay evidence prevented a fair hearing from being held and resulted in an overall denial of justice. See *Yiannopoulos* v. *Robinson,* 247 F(2d) 655; 7th Cir., 1957.

Meticulous care must be exercised lest procedure by which alien is deported not meet essential standards of fairness. See *Barese* v. *Ryan,* 203 I. Supp. 880.

There should be a strict construction of the statute. Although not penal in character, deportation statutes as a practical matter may inflict banishment or exile and should therefore be strictly construed. See *Barber* v. *Gonzales,* 74 S.Ct., 822; 347 U.S., 637.

Doubt in interpretation of the section re deportation must be resolved in favor of alien. *Sawkaw* v. *INS,* 314 F(2) 34; *Wood* v. *Hoy,* 266 F(2d) 825; *Gubbles* v. *Hoy,* 261 F(2d) 952.

The Government waited more than four years before commencing deportation proceedings, only after alien had gone to Jordan and remarried in 1962 and later filed for citizenship on November 17, 1962. This is an unfair procedure, having lulled alien into a false sense of security and after alien had made other commitments. The Application for Naturalization is still pending in the Office of the Naturalization Service, no decision having been rendered to this date.

Voluntary departure should have been granted in lieu of deportation. Alien had lived in U.S. since Sept. 1955, had no other involvement with authorities, was steadily employed at the General Electric Co. for more than 7 years. Statutory eligibility for voluntary departure was established Sect. 244e of I & N Act. This denial was unnecessarily harsh and vindictive.

There was a fatal variance between the allegation in the last paragraph of the order to show cause and the applicable statute in that no recital was made of Sect. 241 C l. 9, 10 & 11 "unless such alien shall establish to the satisfaction of the Atty. General that such marriage was not contracted for the purpose of evading any provisions of the immigration laws."

CONCLUSION.

It is respectfully submitted that the hearings accorded to this petitioner were not fair or legal; that the acceptance of the improper evidence was highly prejudicial; that due process was not accorded to alien. That the doctrine of the *Escobedo* case should apply to the instant case. A deportation case is equivalent to a criminal case

and more serious in many respects. That the statement taken from alien was in flagrant disregard of his Constitutional rights and for other foregoing reasons the petition for Writ of Certiorari should be granted.

Respectfully submitted,

MUSA HAMADEH
By WILLIAM GREENHOUSE
& OTTO OPLATKA
His Attorneys.
110 S. Dearborn St.
Room 1005
Chicago, Ill.
263-6268